Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1851.

JACQUELINE BARNDT,

Petitioner,

v.

WISSAHICKON SCHOOL DISTRICT, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION.

This brief is filed on behalf of respondents named on page 1 of Petitioner's brief (except Elizabeth Allen and George T. Bauer). These respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's judgment in this case. That order appears in appendix A to Petitioner's petition. It affirms the judgment of the U. S. District Court for the Eastern District of Pennsylvania, Lord, Ch. J., the opinion and order of which are printed as Exhibit B to Jacqueline Barndt's petition and are reported at 475 F. Supp. 503.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Respondents object to the following words at the end of Petitioner's Questions Presented number 3. Respondents say that these questions are not proper for consideration here, having been held to be foreclosed and excluded from consideration by admissions in the Court below:

> . . . where the prosecutor-superintendent of schools is a statutory member of the school board, and where there is no right to de novo appeal.

COUNTERSTATEMENT OF THE CASE.

Petitioner correctly says on page 7 of her brief that she was a tenured professional employee of respondent Wissahickon School District. But her next statement is incorrect in saying:

> . . . (The other defendant-respondents in this case are all the members of the Board of School Directors at the time of petitioner's dismissal as well as the Superintendant of Schools.)

Since this inaccuracy of characterization probably does not affect major issues, correction has been relegated to a final page of this brief entitled Supplement.

For their own Counter-Statement of the Case, Respondents incorporate the first three pages of the Opinion of the United States District Court, reproduced at pages 3a to 5a inclusive of Petitioner's Appendix B.

Toward the end of Petitioner's Statement there are two other matters which Respondents say are objectionable because they are argumentative and also because they go beyond the record: i.e.

(a) By citing a certain Pennsylvania Commonwealth Court case, Petitioner seeks to go beyond the appeal procedure provided by the Pennsylvania School Code and to show that it has been narrowed by judicial interpretation. Although it is deemed inappropriate, the contention is nevertheless answered hereafter in the part of Respondent's discussion entitled *Landi.*[1]

(b) Finally, Respondents disclaim statements appearing at the very end of petitioner Barndt's Statement of the Case wherein she refers to the scope of review of school board hearings and also to the function of the School Superintendent. Although these argumentative statements are deemed inappropriate they will nevertheless be answered hereinafter under Discussion.

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1. *Landi v. West Chester Area School District,* 23 Pa. Commonwealth Ct. 586, 589, 353 A. 2d 895 (1976).

CONDENSED SUMMARY OF REASONS FOR DENYING THE WRIT.

I. The Decision Below in No Way Conflicts With *Staton v. Mayes.*[2]

The *Staton* case had nothing in common with *Hortonville*[3] or the present case because *Staton* concerned a palpable violation of procedural due process. The *Staton* record showed flagrant personal bias on the part of school board members who had avowedly sought dismissal of the employee. In the *Hortonville* case, bias had been considered as a possibility but found not to exist. In the instant case there was not even the slightest hint of actual bias.

II. The Decision Below Does Not Conflict in the Slightest With *Ward v. Monroeville.*[4]

The decision below was completely unlike *Ward* or, for that matter, *Ward's* progenitor *Tumey.*[5] Those were cases where the 'tribunals' revenues depended on their levies of fines and costs. There is no such element in the instant case; no profit motive was remotely imputable to the school board.

III. All Contentions of Petitioner Are Fully Negated in the Opinions of the Court Below—Appendices A and B.

DISCUSSION.

The following discussion will be confined strictly to points already raised, and is designed simply to add a little

2. *Staton v. Mayes,* 522 F. 2d 908 (10th Cir.) cert. denied 434 U. S. 907 (1977).

3. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U. S. 482 (1976).

4. *Ward v. Village of Monroeville,* 409 U. S. 57 (1972).

5. *Tumey v. Ohio,* 273 U. S. 510 (1927).

meat to the bare bones of the preceding skeletonized statements. Reasons for denying the writ will first be discussed. Then the items challenged in Petitioner's Questions Presented, and finally the points which we challenged in Barndt's Statement of the Case will be argued.

I. Inapplicability of *Staton v. Mayes.*

Like many of the cases in which personal constitutional rights are involved, *Staton v. Mayes* at 552 F. 2d 913 sets forth the basic rule expounded in *In re: Murchison,* 349 U. S. 133, 136 (1955):

> a fair trial and a fair tribunal is the basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

In *Staton v. Mayes* at 552 F. 2d 913, the Court of Appeals for the 10th Circuit then proceeded to analyze the evidence which clearly showed that at least three members of the five man school board had made repeated statements such as "Dr. Staton has got to go". For instance, defendant Mayes advertised in a Muskogee, Oklahoma paper that he was running on a campaign to get rid of Dr. Staton. (Ibid. 916).

This was a clear case of actual bias and any references to the *Hortonville* case simply manifested that the presumption of school board fairness could not survive proof of actual bias. (Ibid. 913). The principles of *Hortonville* were honored, including that of the obvious interest of the State in the particular procedure provided for the removal of school personnel. Id. 913.

The Opinion of the *Staton* court was at pains to point out that no presumption of regularity could withstand proof of actual bias. In the process it was suggested that the *Hortonville* case, in which there had been a hint of

bias, was a different matter in that the facts of the school personnel's dereliction (by illegal strike) were admitted. But that does not mean that there was any possible conflict between *Staton* and the instant case wherein there had been no inkling of actual bias.

II. Inapplicability of *Ward v. Village of Monroeville.*

Ward v. Village of Monroeville, 409 U. S. 57 (1972) is even farther from the mark. In the *Hortonville* decision itself (at 426 U. S. 491), the following distinction is made.

> Respondents' argument rests in part on doctrines that have no application to this case. They seem to argue that the Board members had some personal or official stake in the decision whether the teachers should be dismissed, comparable to the stake the Court saw in *Tumey v. Ohio,* 273 U. S. 510 . . . or *Ward v. Village of Monroeville,* 409 U. S. 57 (1972).

The vice of trial before the Ohio tribunal in *Tumey v. Ohio* is exposed in this one sentence by the late Chief Justice William Howard Taft:

> There is, therefore, no way by which the Mayor may be paid for his services as judge, if he does not convict those who are brought before him. . . .
> 273 U.S. 510, 520 (1926).

The *Ward* case was one in which there was some sort of insulation between the revenue-producing court and the functionary who served as judge, but *Tumey* was held controlling. There is no way, however, that the Pennsylvania school board system can be likened to that of those minor criminal courts which operated on a fee system. In the court below, there appears the following language (App. 7a) which, we submit, is conclusive:

> . . . Plaintiff offers no reason why the Wissahickon School Board's pecuniary interest in her employment would impermissibly bias its factfinding but not its policymaking and we can imagine none. The attempted distinction between the alleged unfairness here and that treated in *Hortonville* fails, the Supreme Court opinion there is dispositive and plaintiff's first due process argument is rejected.

Even in *Hortonville*, it was a known fact that the teachers were on strike, which is to say that the teachers' pay was at issue. But in the instant case, there was no word of testimony whatsoever as to Mrs. Barndt's salary and no hint as to what the effect of her dismissal would have, plus or minus, on the school exchequer.

* * *

The following discussion relates to objections stated heretofore concerning Barndt's Questions Presented, and also as to her Statement of the Case. In our Counterstatement, we asserted that certain points were not properly includable. Thus the following comments are added only in the event that Respondents were in error in assuming that those points of Petitioner are not entitled to consideration.

1. In part 3 of her questions stated, the rhetorical question as to facial invalidity of the Pennsylvania School Code dismissal procedure includes the following words:

> . . . where the prosecutor-superintendent of schools is a statutory member of the school board. . . .

At 14a of the Opinion below, the court ruled that this matter of Superintendent Stoutenburgh's status was not properly in the case by virtue of plaintiff's failure to

answer the School Board's affidavit. We suggest it is improper to try to revive the point again.

2. At the same place, the question contains this additional language which we deemed objectionable:

> . . . and where there is no right to de novo appeal.

That claim is rejected in the Opinion below at 7a, in large part upon Barndt's own concession that "there is no constitutional right to an appeal de novo."

There is also discussion of the de novo appeal matter in another aspect at Appendix 10a. Notable also is the third paragraph of the School Code provision for appeal to the Secretary of Education, 24 Pa. Stat. Ann. § 11-1131, as quoted at page 6 of Petitioner's brief:

> The Superintendent of Public Instruction [now Secretary of Education] shall review the official transcript of the record of the hearing before the board, and may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order. . . .

3. The *Landi* case. In our Counterstatement of the Case, Respondents have challenged Barndt's citation of *Landi v. West Chester Area School District*, 23 Pa. Commonwealth Ct. 586, 589, 353 A. 2d 895 (1976). Our first objection to the reference was that it goes beyond the record, and attempts to inject a point not presented to the court below. Moreover, we suggest here that it is not presented with complete candor. The Substantial Evidence Rule which it quotes is of such universal acceptance that need for citation is deemed unnecessary. But what was presented to the Commonwealth Court in that case was the record before the School Board plus the findings of fact of the Secretary of Education. The following sentence will suffice to illustrate:

> Our careful review of the record convinces us that a reasonable man acting reasonably could have reached the decision made by the Board and the Secretary. . . . 353 A. 2d at 897.

As recently as February 26, 1980, the function of the Commonwealth Court in a case like *Landi* was restated in *Nagy v. Belle Vernon Area School District,* — Pa. Commonwealth Ct. —, 412 A. 2d 172, 174 (1980):

> Our scope of review in appeals from the Secretary of Education is to determine whether or not an error of law was committed, constitutional rights were violated, or necessary findings of fact are unsupported by substantial evidence. *McCoy v. Lincoln Intermediate Unit No. 12,* 38 Pa. Cmwlth. 29, 391 A. 2d 1119 (1978).

We trust the foregoing references to the *Landi* case and the manner in which the Substantial Evidence Rule is applied in Pennsylvania Appellate proceedings will suffice to justify our objection to the attempt to include discussion of the *Landi* decision in Petitioner's Statement of her case.

CONCLUSION.

For the foregoing reasons, Respondents suggest that the reasons for a grant of the writ proposed by petitioner Barndt are inadequate, and that the Writ of Certiorari to Review the Judgment and Order of Court of Appeals for the Third Circuit should not be granted.

Respectfully submitted,

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Dated: June 12, 1980.

SUPPLEMENT TO RESPONDENTS' BRIEF IN OPPOSITION.

As mentioned earlier, the sole function of this Supplement will be to correct that part of the Petitioner's Statement of the Case which described Respondents as:

> . . . all the members of the Board of School Directors at the time of petitioner's dismissal.

Our purpose is merely to avert any hint of waiver or admission as to the rights of a number of persons who never had any connection with the Barndt dismissal. Insofar as possible, the individuals to be named hereafter will be listed, last names only, in the order in which they appear on the first page of Petitioner's brief.

> Sabia. Mr. William Sabia is a former member of school board who disqualified himself and took no part whatsoever in the Barndt proceedings.
>
> Allen and Bauer. Elizabeth Allen and George T. Bauer are not represented here, never having been subjected to jurisdiction of the United States Court below.
>
> Thompson, Correnty, Gorg, Richwagon, Thornton, and Catz. These are the names of past or present members of the Wissahickon School Board, none of whom were on that Board at any time during the Barndt dismissal hearings.

Motions setting forth the foregoing facts as to the status of individual defendants were filed below and noted at the very end of the Opinion of Lord, Ch. J. as follows:

> The various other motions filed by individual defendants will be denied as moot in light of my granting of the umbrella motion (App. 25a).